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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 75-281

JOHN G. SEAY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Seventh Circuit

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To the United States Court of Appeals
for the Seventh Circuit

John G. Seay, petitioner, prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this case on June 30, 1975.

OPINION BELOW

The opinion of the United States Court of Appeals is not yet reported, but is set forth in full as Appendix "A" to this petition on Pages A-1 through A-3. The opinion of the Court of Appeals affirmed the conviction of John G. Seay for an

alleged violation of 18 USC, Section 2314. The petitioner had been tried by bench trial in the United States District Court for the Eastern District of Illinois, the Honorable James L. Foreman, Judge presiding, and was found guilty. The Court denied defendant's post-trial motions, imposed sentences upon the defendant and entered judgment of conviction against the defendant.

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 30, 1975. A Petition for Rehearing was filed on June 11, 1975 and denied by the United States Court of Appeals on July 25, 1975. (Appendix "B") Jurisdiction of this Court is invoked under 28 USC, Section 1254(1).

QUESTION PRESENTED

Did the court below err in affirming the District Court's judgment of conviction of petitioner by holding that petitioner had sufficient "fraudulent intent" as required by Title 18, USC, Section 2314, at the time that he caused a security to be transported in interstate commerce, and whether or not said security which petitioner caused to be transported in interstate commerce was "falsely made, forged, altered or counterfeited", when the fraudulent intent of petitioner's scheme, had been completed prior to the making of the security (check) involved, and its passage or transportation in interstate commerce.

STATUTE INVOLVED

The statute involved is Title 18, United States Code, Section 2314 which states as follows:

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country."

STATEMENT OF THE CASE

This action arose by the return of an indictment by the Grand Jury for the United States District Court for the Eastern District of Illinois which contained a single count charging John G. Seay with a violation of Title 18, USC, Section 2314 in that he did, with unlawful and fraudulent intent, cause to be transported in interstate commerce a falsely made check.

The case was tried before the Honorable James L. Foreman, and the defendant was found guilty. The trial court denied all of defendant's post-trial motions, imposed a term of imprisonment on petitioner, John G. Seay.

The petitioner, John G. Seay, raised one issue on appeal to the United States Court of Appeals for the Seventh Circuit:

> "NO FRAUDULENTLY MADE OR FORGED CHECK WAS EVER PASSED IN INTERSTATE COMMERCE"

The petition on this appeal prays certiorari solely on this issue, that there was insufficient evidence to prove that petitioner caused a fraudulently made or forged check to be passed in interstate commerce.

On June 27, 1972, defendant, John G. Seay, used his official capacity as an accounting official of State Community College, East St. Louis, Illinois to cause a check to be signed by proper college officials and drawn upon the State Community College Revolving Fund Account, Auxiliary Services Fund, at the First National Bank at East St. Louis payable to "Arco Book Distributors" in the amount of $1743.00 (Check No. 1). This check was **not** transported in interstate commerce.

On June 28, 1972, the defendant opened an account at the Southern Illinois National Bank under the fictitious name "Arco

Book Distributors", using the fictitious name of "Gerald Thomas" as sole signatory for the account. Defendant used $200.00 of his own funds to open this account.

On June 29, 1972, defendant deposited to the "Arco" account Check No. 1 in the amount of $1743.00. On June 30, 1972, the balance in the "Arco" account was $1893.00.

On July 3, 1972, defendant drafted a check on the "Arco" account payable to John Seay and signed by defendant with the fictitious name "Gerald Thomas" in the amount of $1883.00 (Check No. 2). Defendant deposited Check No. 2 in his personal account in the Gateway National Bank in St. Louis, Missouri. Check No. 2 was transported from St. Louis, Missouri to East St. Louis, Illinois through normal banking channels.

Defendant's scheme was thereafter uncovered and defendant made immediate and full restitution to the college.

Check No. 2 was the only check to pass in interstate commerce, and was alleged to be the forged or falsely made security which defendant was charged with having transported in violation of 18 USC, Section 2314.

The sole issue presented for appeal is whether, based upon the facts as stipulated, the court erred in finding that the defendant violated 18 USC, Section 2314.

These facts indicate that the first check was indeed fraudulent, but never passed in interstate commerce, and therefore, could not have been the subject of a conviction under 18 USC, Section 2314. The facts further indicate, that the second check, which indeed did pass in interstate commerce, was not made with any fraudulent intent, as any fraudulent scheme which the petition had devised, was complete when the State Community College was deprived of the control of the funds which petitioner misappropriated.

This same issue was presented to the United States Court of Appeals for the Seventh Circuit by the petitioner and remains unanswered.

The opinion of the United States Court of Appeals for the Seventh Circuit affirmed the conviction of petitioner and held that a fictitious name can create a false, forged security within the meaning of 18 USC, Section 2314.

In so holding, the Court of Appeals for the Seventh Circuit refused to answer, and did not address itself to the issue of whether or not the fraudulent intent, if any, of petitioner with regard to Check No. 1, that check drawn by the Illinois Community College at petitioner's request and suggestion as an official thereof, could be imputed to the drawing by petitioner of a check on the fictitious Arco account signed with the fictitious name of Gerald Thomas.

To do so is to allow the conviction under 18 USC, Section 2314, without finding one of the requisite conditions provided by the statute, namely, that the transportation of the forged or fraudulently made security shall be made with fraudulent intent.

REASONS FOR GRANTING THE WRIT

The petitioner, John G. Seay, respectfully and most earnestly and sincerely urges that there exists in this cause manifest, overwhelming and compelling reasons for the granting of a writ of certiorari in this cause. The reasons are as follows:

1. This Court has never decided if a fictitious name is sufficient to create fraudulent intent for the purposes of finding a violation of 18 USC, Section 2314, without further proof of fraudulent intent in the making or transportation of such check.

2. No court has ever reached a conclusion similar to that arrived at by the United States Court of Appeals for the Seventh Circuit in the opinion below.

3. No court has ever imputed fraudulent intent to the making of a check or security for the purposes of finding a violation of 18 USC, Section 2314, in the manner of the United States District Court for the Eastern District of Illinois or the United States Court of Appeals for the Seventh Circuit as indicated in their opinions attached hereto as Appendix "A" and "C".

I

This Court Has Never Decided the Question of Whether Fraudulent Intent May Be Imputed to a Check or Security, When the Scheme to Defraud, if Any, Is Complete and No Person, Institution, or Other Entity Is in Fact, or Possibly Could Be, Defrauded by the Additional Act of the Petitioner.

The United States Court of Appeals for the Seventh Circuit in its opinion affirmed the opinion of the United States District Court for the Eastern District of Illinois and adopted said opinion as its own.

Both of these opinions overlook and misstate the essential requirements of 18 USC, Section 2314 which, by definition, consists of three separate and distinct conditions.

A. A falsely made or forged security; and

B. Transported in interstate commerce; and

C. Willful or fraudulent intent.

The charge against defendant and his conviction by the District Court, and affirmance by the United States Court of Appeals for the Seventh Circuit, renders this a unique case in that there is a telescoping of two separate transactions into the one in order to find a violation of the statute.

The trial court found that Check No. 1 was never passed in interstate commerce. (Appendix "C", Page 1)

Therefore, although this check was fraudulently made, it cannot be the source of conviction under 18 USC, Section 2314 which clearly requires the forged or fraudulently made security to be transported in interstate commerce. The only check which could be the source of a conviction under this statute is the second check which did pass in interstate commerce, but was totally without fraudulent intent.

The Government has sought to make its case based solely on the use of a fictitious name on Check No. 2 to have the fraudulent intent, if any, which petitioner formed in the making of Check No. 1, to the making of Check No. 2. Imputing such fraudulent intent is unique and has never been used by any court in a conviction under 18 USC, Section 2314 prior to the case at bar. The Court of Appeals for the Seventh Circuit, as well as the District Court for the Eastern District of Illinois determined that a fictitious name can create a fraudulent or falsely made security within the meaning of the statute. However, the courts below failed to notice the essence of the case

as they cited, which required that the fictitious name be used with fraudulent intent, or as an "instrument of fraud", *Hubsch v. United States*, 256 F2d 820 (5th Cir., 1958).

Logically, if the fictitious name is to be used as an instrument of fraud, a person must be defrauded, or at least there must be a class of persons who could conceivably be defrauded by the use of the fictitious name.

In the case at bar, we are faced with the unique situation that the use of the fictitious name by the petitioner could not have defrauded any person, or class of persons, and in fact, no person or institution was defrauded by the drawing of the second check using the fictitious name of Gerald Thomas by the petitioner.

Under the Uniform Commercial Code in effect in Illinois as SHA, Chapter 26, Section 3-405, any loss which might have been occasioned by the banks would have fallen upon the Illinois Community College. As the Illinois Community College had already been defrauded to the full extent possible, under the facts, therefore, it was impossible for the banks or the Community College to have been defrauded by the use or making of Check No. 2 by the petitioner.

CONCLUSION

Certiorari is warranted here. Each of the elements which this Court has traditionally found to warrant the grant of certiorari is present here:

A. The jurisdictional issue under a law of the United States, to-wit: 18 USC, Section 2314 is involved;

B. This court has never decided the issue presented in this case;

C. The holding of the Court of Appeals that the fraudulent intent may be imputed to an innocently made security sufficient to comply with 18 USC, Section 2314 is novel, without precedence, either legislative or judicial, and has such far reaching implications that the issue ought to be decided clearly and unequivocally by no less authority than this Court.

The errors of the Court below should not be permitted to stand.

Respectfully submitted

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APPENDIX "A"

In the
United States Court of Appeals
For the Seventh Circuit

No. 75-1124

United States of America,

Plaintiff-Appellee,

v.

John G. Seay,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Illinois—No. 74 57 E
James L. Foreman, Judge.

Argued May 29, 1975—Decided June 30, 1975

Opinion

Before Pell and Sprecher, *Circuit Judges,* and East, *Senior District Judge.**

Per Curiam. An indictment charged that the defendant, John G. Seay, while employed at State Community College, East St. Louis, Illinois, received a $1,743 check dated June 27, 1972, drawn by State Community College and payable to Arco Book

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* Senior District Judge William G. East of the District of Oregon is sitting by designation.

Distributors, an entity having a fictitious business name and address, which check defendant deposited in an account established by him in Arco's name at Southern Illinois National Bank, East St. Louis, although the check was not in payment for any services, supplies or equipment rendered or to be rendered by the defendant or Arco; and that from on or about July 3, 1972, the defendant, with unlawful and fraudulent intent, did cause to be transported in interstate commerce from Missouri to Illinois, a falsely made security, namely a check drawn on Arco's account at Southern Illinois National Bank in the amount of $1,883, payable to the defendant and deposited in his account at the Gateway National Bank in St. Louis, Missouri, which check was signed by him in the fictitious name of Gerald Thomas, all in violation of 18 U.S.C. § 2314.

Upon waiver of trial by jury, the district court denied defendant's motion to dismiss the indictment and for a judgment of acquittal, and adjudged the defendant guilty as charged. *United States v. Seay*, 386 F. Supp. 550 (E.D. Ill. 1974).

Upon appeal, we affirm and adopt as our own the district court's opinion, supplemented with the following additional authority:

(1) *United States v. Ackerman*, 393 F.2d 121 (7th Cir. 1968), wherein we quoted with approval the following from *Hubsch v. United States*, 256 F.2d 820, 824 (5th Cir. 1958):

> [W]here a person not only takes an assumed name but uses that name to designate a fictional person with characteristics, personality and a semblance of identity, the use of the fictitious name as an instrument of fraud in the impersonation of the fictional person is as much a forgery as though the fictional character was real.

Ackerman, supra at 122.

(2) Annotation, What Constitutes a "Falsely Made, Forged, Altered, or Counterfeited" Security Within Meaning of 18 U.S.C.

§ 2314, Making Transportation of Such Securities a Criminal Offense, 4 A.L.R. Fed. 793 (1970).

(3) *United States v. Tucker*, 473 F.2d 1290, 1294 (6th Cir.), *cert. denied*, 412 U.S. 942 (1973) ("Our holding [affirming the conviction] appears to be in accord with the statutory purpose of making guilt or innocence turn upon whether the actor wrongfully intended to place into commerce a falsely made document instead of focusing upon the precise method by which its lack of authenticity was effected.")

Judgment of conviction is affirmed.

A true Copy:

Teste:

. . . . . .

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX "B"

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

July 25, 1975

Before

Hon. Wilbur F. Pell, Jr., Circuit Judge

Hon. Robert A. Sprecher, Circuit Judge

Hon. William G. East, Sr. District Judge

United States of America, Plaintiff-Appellee, No. 75-1124 vs. John G. Seay, Defendant-Appellant.	Appeal from the United States District Court for the Eastern District of Illinois, East St. Louis Division. (74 Cr 57 E)

Order

On consideration of the petition for rehearing filed in the above-entitled cause,

It Is Hereby Ordered that the petition for rehearing in the above-entitled appeal be, and the same is hereby, Denied.

APPENDIX "C"

In the District Court of the United States
For the Eastern District of Illinois

United States of America,
Plaintiff,
vs.
John G. Seay,
Defendant.

Criminal
No. 74-57-E.

Memorandum and Order

Foreman, Judge:

Defendant has waived trial by jury with the consent of the Government pursuant to Rule 23(a), Federal Rules of Criminal Procedure. This matter comes before the Court upon a stipulated statement of facts. Defendant has filed a motion to dismiss the indictment and a motion for judgment of acquittal. The indictment charges him with violating 18 U.S.C. § 2314 in that he caused to pass in interstate commerce a forged check payable to the order of John Seay in the amount of $1883 drawn upon the Southern Illinois National Bank and signed with the fictitious name "Gerald Thomas" as drawer of the check.

The facts, as stipulated, in relevant part, are, as follows:

On June 27, 1972, the defendant used his official position as an accounting officer of State Community College, East St. Louis, Illinois, to cause a check to be signed by proper college officials and drawn upon the State Community Col-

lege Revolving Fund Account, Auxiliary Services Fund at the First National Bank, East St. Louis, Illinois, payable to "Arco Book Dist." in the amount of $1743 (hereinafter "Check No. 1"). This check was not transported in interstate commerce. The next day the defendant opened an account at Southern Illinois National Bank in East St. Louis under the fictitious and assumed name of Arco Book Distributors (hereinafter "Arco"), having a fictitious address of 829 Missouri Avenue, East St. Louis, Illinois. Gerald Thomas, the assumed and fictitious name used by defendant, was the authorized signatory for this account. The $200 initial deposit utilized to open this account was John Seay's personal funds.

On June 29, 1972, defendant deposited Check No. 1 in the Arco account at the Southern Illinois National Bank. The defendant, using the assumed and fictitious name of Gerald Thomas, endorsed the check at the time of the deposit.

On June 30, 1972, the Arco account had a balance of $1,-893. Later, on July 3, 1972, the defendant drafted a check (hereinafter "Check No. 2") payable to the order of John Seay in the amount of $1,883 drawn on the Arco account at the Southern Illinois National Bank, and defendant signed the fictitious and assumed name of Gerald Thomas thereto as drawer of the check. At the time Check No. 2 was drafted, there was a balance of $1,893 in the Arco account at the Southern Illinois National Bank. The defendant then deposited Check No. 2 in his personal account at the Gateway National Bank in St. Louis, Missouri. Shortly thereafter, Check No. 2 was transported from St. Louis, Missouri to East St. Louis, Illinois in normal banking channels.

On July 6, 1972, the Arco account at the Southern Illinois National Bank was debited $1,883, leaving a balance of $10. While $1,883 was debited from the account, no monies, funds or credits debited from the account ever left the Southern Illi-

nois National Bank. The following day, the bank made a reverse entry for the Arco account. The credit balance in the account at the Southern Illinois National Bank was not less than $1,884.55 from July 10, 1972 through August 4, 1972. On August 4, 1972, the defendant made restitution of the funds by executing a draft and voucher drawn upon the Arco account, signed Arco Book Dist., Gerald Thomas, John G. Seay, payable to William G. Matlack, a college official, in the amount of $1743.

Check No. 2, the only check to pass in interstate commerce, is the check which defendant is charged to have transported in interstate commerce in violation of 18 U.S.C. §2314.

At the outset it is also important to recognize what this case is not. There is no indication that "Gerald Thomas" is an "alias" or a name by which the defendant is regularly called. See, e.g., *Berry v. United States*, 471 F.2d 775 (5th Cir. 1959). Nor is there any indication that the defendant represented any facts to the Gateway National Bank other than the information on the face of the check.

Defendant is charged with causing to be transported in interstate commerce a *falsely made security*. The Seventh Circuit recently held that the words "falsely made" and "forgery" as used in §2314, are substantially synonymous. *United States v. Johnson* (7th Cir. No. 74-1035, October 18, 1974). See also, *Greathouse v. United States*, 170 F.2d 512, 514 (4th Cir. 1948); *Marteney v. United States*, 216 F.2d 760, 763 (10th Cir. 1954).

There is a split of authority among the courts on this issue and other courts have held that these two terms are not synonymous. See, e.g., *Stinson v. United States*, 316 F.2d 554 (5th Cir. 1963); *Pines v. United States*, 221 F.2d 584 (8th Cir. 1941); *United States v. Bales*, 244 F.Supp. 166 (E.D. Tenn. 1965). Thus, cases following this view cannot serve as precedent for the Government's position in this action.

The Court, of course, feels bound by the Seventh Circuit's recent pronouncements in *Johnson* and hence the issue becomes whether a check signed by the defendant with a fictitious name as drawer constitutes a "forged" check.

In dealing with the issue of whether the signing of a fictitious name constitutes a forgery, the decisions generally fall into two different categories depending upon whether one accepts the broad or narrow definition of that term. The annotation at 49 A.L.R.2d 852, at 854 states, as follows:

> "The generally accepted rule is that forgery may be committed through the use of a fictitious or assumed name . . . Under the broad definition, forgery may be committed by the use of a fictitious name, with intent to defraud, so long as the instrument in question has a sufficient appearance of validity upon its face to enable it to be used to the prejudice of another, while under the narrow definition, the name signed to the instrument must purport to be the signature of some person other than the one actually signing it."

The "broad rule" was applied in *Cunningham v. United States*, 272 F.2d 791 (4th Cir. 1959), where the defendant signed a fictitious name to a check as drawer, the Court held that forgery was committed by signing the fictitious name with intent to defraud where the check had sufficient appearance of validity upon its face to enable it to be used to the prejudice of another. The Eighth Circuit also has adopted the broad rule by affirming a conviction where the defendant wrote the fictitious name of a payee. *Rowley v. United States*, 191 F.2d 949 (8th Cir. 1951). See also *Hall v. United States*, 372 F.2d 603 (8th Cir. 1967).

In *United States v. Greever*, 116 F.Supp. 755 (D.D.C. 1953), another case which adopted the broad rule, Chief Judge Laws attempted to harmonize the "broad rule" and the "narrow rule"

on the basis of the rationale expressed in *Reg. v. Martin* (1879), 14 Cox, Cr. Cas. 375, 5 Q.B. Div. 34. That latter case held that where the payee in accepting the check has relied upon and given credit to the person who presented the check and not the signature itself, there may be fraud and false pretenses, but there has been no forgery. It is only in a case where reliance is placed upon the signature as creating a valid objection, not on the person who presents the check that forgery has been committed.

Defendant places very strong reliance upon three cases which he claims support the position that the signing of a fictitious name does not constitute a forgery. *Greathouse v. United States*, 170 F.2d 512 (4th Cir. 1948); *Marteney v. United States*, 216 F.2d 760 (10th Cir. 1954); *Gilbert v. United States*, 370 U.S. 650 (1962).

In *Greathouse*, the defendant wrote several checks or bills of exchange. Each was payable to the defendant and signed "Woodruff Motor Sale, Inc., J. W. Greathouse." Greathouse was the true name of the defendant. In a subsequent re-examination of that decision, however, the Fourth Circuit noted:

> "When we reversed Greathouse's conviction, it was because as we viewed the facts, the defendant had merely misrepresented the extent of his authority, but had not used a false name. While such conduct may well constitute a false pretense, subject to state prosecution it is not a forgery." *Cunningham, supra*, 272 F.2d at 793-794.

Thus, the decision in Greathouse is based upon a misrepresentation of authority and not upon the use of a fictitious name and, therefore, can not be precedent for the granting of defendant's motions in this case.

Marteney involved a warehouse receipt which falsely stated that 60,000 bushels of yellow milo were received from C. M.

Henderson by the Garden Grain and Seed Company when, in fact, the company did not receive any milo in store from C. M. Henderson and the company on the relevant date was short such grain in an amount exceeding 380,000 bushels. This case does not really support the defendant's position. That Court noted, as follows:

> "We haven't any doubt that an allegation charging the unlawful interstate transportation of a 'falsely made, forged, altered, or counterfeited security', purporting to be a warehouse receipt of the Garden Grain and Seed Company, states an offense in the words of Section 2314, and that a sentence based upon a plea of guilty to an indictment in those words would not be vulnerable to collateral attack." (216 F.2d at 763).

The *Marteney* court, however, reversed the lower court's decision and remanded the action for a hearing pursuant to 28 U.S.C. § 2255, only because of the wording of the charge, since the particular charge in that case also alleged that the receipt was falsely made because the issuing warehouse did not have in storage the grain represented by the receipt. These words, the court decided, were critically intended to describe the nature of the document. "Plainly upon the face of the charges, the warehouse receipts were actually what they purported to be. Their falsity lies in the representation of facts, not in the genuineness of execution." (216 F.2d at 763-764).

In *Gilbert, supra,* the Supreme Court cited both the *Greathouse* and the *Marteney* decisions. It noted that the cases construing the words "forge" under the federal statutes have generally drawn a distinction between false and fraudulent statements and spurious or fictitious makings. The Court concluded: "Where the falsity lies in the representation of facts, not in the genuineness of execution, it is not forgery." (370 U.S. at 658).

In the instant action, the Court believes that the falsity of Check No. 2 lies in the genuineness of its execution. There was

no such corporation or individual as were listed as the drawer of the check. Therefore, the check could not have been genuine in its execution.

The Court concludes that the weight of authority and the better reasoning support the "broad rule" that an instrument is forged when it contains the name of a fictitious person as drawer. See, e. g., *Hall v. United States*, 372 F.2d 603 (8th Cir. 1967); *Jones v. United States*, 234 F.2d 812 (4th Cir. 1956); *Rowley v. United States, supra; Milton v. United States*, 110 F.2d 556 (D.C. Cir. 1940); *Buckner v. Hudspeth*, 105 F.2d 393, 395 (10th Cir. 1939); *United States v. Carney*, 328 F.Supp. 960 (D. Del. 1971). See also, 49 A.L.R.2d 852; *Delmar Bank of University City v. Fidelity Deposit Co. of Md.*, 428 F.2d 32 (8th Cir. 1970); *Ketchum v. United States*, 327 F.Supp. 768 (D. Md. 1970).

There is a Seventh Circuit decision which has been cited as favoring the "narrow rule". *LaFever v. United States*, 257 F. 2d 271 (7th Cir. 1958). That decision is not completely clear because there had been no hearing in the district court and the *pro se* petition did not clearly delineate the factual allegations. One of the two cases cited in the opinion, moreover, stated: "And the signature of a fictitious name, with fraudulent intent is as much a forgery as if the name used was that of an existing person. (citations omitted)." *Greever, supra* at 756. Thus, it is not at all clear that the Seventh Circuit by that opinion intended to adopt the narrow rule.

Accordingly, a check to which a fictitious name is affixed as drawer with the intent to defraud is a forged check within the meaning of §2314.

Before the check can be determined to be a forged check, the defendant must have had an intent to defraud at the time he signed the fictitious name to the check. To commit the offense with which he is charged, the defendant must also have

had an "unlawful or fraudulent intent" at the time he caused the check to be transported in interstate commerce.

The Court will first examine the intent at the time the check passed in interstate commerce. Defendant takes a very narrow view and claims that as to Check No. 2, he had no fraudulent intent, because there were sufficient funds in the drawee bank to cover the check. Thus, by this check no one would be defrauded.

This argument ignores the fact that the transportation of Check No. 2 was part of a scheme to defraud the State Community College. In a written statement the defendant admits "the whole purpose of the aforementioned scheme was to fraudulently convert funds of State Community College of East St. Louis, Illinois to my own personal use". The transportation of this check was an essential element in defendant's scheme to defraud. After depositing the funds in the bank account of Arco Book Company, defendant needed to transfer the funds to his personal account to make the money available for his personal use. Thus, Check No. 2 payable to John Seay was an integral step to complete this attempt to defraud. Accordingly, it cannot be said that the defendant's attempts to defraud the State Community College ended with the deposit of Check No. 1 in the Southern Illinois Bank. In reality, the transportation of Check No. 2 was an essential part of defendant's plan to defraud the State Community College.

Defendant contends that the third paragraph of §2314, pursuant to which the Government is bringing this action, was not intended to cover a scheme to defraud such as the one in this case. He points out that the second paragraph of §2314,[1]

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[1] The first three paragraphs of 18 U.S.C. § 2314 are as follows:

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of

which make illegal certain confidence game swindles, uses the language "scheme or artifice to defraud", while the third paragraph uses only the more general language "with unlawful or fraudulent intent". Defendant, thus, seems to contend that since Congress did not use the specific "scheme or artifice" language in the third paragraph, it evidences a Congressional intent to make punishable under the third paragraph only the transportation in interstate commerce of forged checks where the specific check was executed or forged with fraudulent intent. According to this argument, the transportation of a check for which there were sufficient funds on deposit would not constitute a violation of the statute, even if the check was a part of a scheme to defraud.

This argument, however, ignores the dates in which Congress enacted the various paragraphs of §2314. Congress enacted the second paragraph of this section in 1956, while the third paragraph with its more general language was adopted by Congress at a much earlier time. Defendant's argument would have much greater plausibility if the two paragraphs had been enacted simultaneously. Since the second paragraph with the more specific language was enacted after the third paragraph, it is not fair to assume a congressional purpose to exclude

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$5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited;"

from offenses punishable under the third paragraph those instances where a defendant causes a forged check to pass in interstate commerce pursuant to a scheme to defraud merely because in a subsequent adoption of another paragraph of the section, Congress used the words "any scheme or artifice to defraud . . .".

Moreover, the same reasoning compels the conclusion that when the defendant signed the fictitious name to the check, he had the intent to defraud. This check was an essential part of defendant's scheme to defraud the College and thus the signing of the fictitious name was done with the intent to defraud. Therefore, the Check No. 2 constitutes a forged check within the meaning of §2314.

The Court concludes that in adopting the third paragraph of §2314 Congress intended to make illegal the acts committed by this defendant.

Accordingly, defendant's motion to dismiss the indectment and his motion for a judgment of acquittal are hereby Denied.

The Court hereby finds and adjudges the defendant guilty as charged. The Court also orders that a pre-sentence report and investigation be conducted. Defendant shall report to the United States Probation Office on or before December 27, 1974.

Dated: Dec. 19, 1974.

/s/ JAMES L. FOREMAN
United States District Judge

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-281

JOHN G. SEAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that there was insufficient evidence of his fraudulent intent to cause a forged or fraudulently made security to be transported in interstate commerce.

Following a non-jury trial on stipulated facts in the United States District Court for the Eastern District of Illinois, petitioner was convicted of one count of unlawful transportation of a falsely made security in interstate commerce, in violation of 18

U.S.C. 2314. He was sentenced to three years' imprisonment, suspended on condition that he spend four months in a jail-type institution. The court of appeals affirmed *per curiam* (Pet. App. A).

The stipulated evidence showed that on June 27, 1972, petitioner caused his employer to sign a check drawn on its account at an East St. Louis, Illinois, bank, payable to a fictitious payee (S. 2b; Exs. A and B).[1] On the following day, petitioner opened an account with his personal funds at a different bank in East St. Louis, Illinois, in the name of that fictitious enterprise (S. 2c; Ex. D). On June 29, 1972, petitioner endorsed his employer's check in the name of the fictitious authorized signatory and deposited it in the newly opened account (S. 2d; Ex. C). On July 3, 1972, petitioner drafted a check payable to himself on the fictitious account, in an amount in excess of this deposit. Petitioner signed the name of the fictitious authorized signatory as drawer of the check (S. 2f; Ex. E). On the same day, he endorsed this check in his own name and deposited it in his personal account at a bank in St. Louis, Missouri (S. 2h; Ex. E). Upon deposit, this check was transported from St. Louis, Missouri, to East St. Louis, Illinois, for payment (S. 2i). On July 7, 1972, petitioner's Illinois bank decided not to honor that check due to suspicious circumstances (Ex. A).[2]

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[1] "S." and "Ex." refer respectively to the stipulations and government exhibits at trial.

[2] The record does not disclose the manner in which the bank was alerted to the fraudulent nature of this check.

On August 4, 1972, petitioner signed a confession, which constituted a portion of the stipulations (S. 2a), admitting the fraudulent scheme. He also authorized his Illinois bank to make his employer's account whole (S. 2*l*; Ex. G).

Petitioner contends (Pet. 5) that his scheme to defraud his employer had reached fruition when he deposited the first check into the newly opened account, and hence there was no evidence of the requisite fraudulent intent at the time of the subsequent interstate transportation of the second check drawn on this account and made payable to himself. The courts below properly rejected this contention, concluding that the attempted transfer of funds from the intermediary account to his personal account, which caused the check to be transported in interstate commerce, was an integral part of the fraudulent scheme (Pet. App. A, p. A-2; Pet. App. C, p. A-14).

Petitioner's argument that the fraudulent scheme was complete upon deposit of the first check in the intermediary account will not withstand analysis. The transfer of the proceeds of that check through the dummy account allowed petitioner to obtain physical possession of the funds without personally appearing in his employer's accounts as the payee of a check. As petitioner admitted in his confession, the issuance of the second check under a fictitious name was a necessary part of his plan to convert the funds while minimizing the possibility of detection and prosecution (S. 2a; Ex. A). Petitioner therefore

had the requisite fraudulent intent when he signed the fictitious name on the second check and caused it to be transported in interstate commerce by depositing it in his own account. *United States* v. *Ackerman*, 393 F. 2d 121 (C.A. 7). See *United States* v. *Sheridan*, 329 U.S. 379, 384-385, 387; *United States* v. *Johnson*, 504 F. 2d 622, 627 (C.A. 7); *United States* v. *DeKunchak*, 467 F. 2d 432, 437 (C.A. 2).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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